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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

ANA LUCIA HODGE, ET AL.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Equal Access to Justice Act's provisions requiring the United States to pay attorney's fees and other expenses to private parties who prevail in adversary adjudications in which the government's position is not substantially justified apply to deportation proceedings brought by the Immigration and Naturalization Service.

LIST OF PARTIES

As permitted by Rule 12.2 of this Court, this petition for writ of certiorari seeks review of three cases arising out of the same court and involving identical or closely related questions. The three cases are:

Ana Lucia Hodge v. United States Department of Justice, 929 F.2d 153 (5th Cir. 1991).

Rodolfo Escobedo Gonzalez v. Immigration and Naturalization Service, No. 90-4440 (5th Cir. April 22, 1991).

Harold J. Amador-Castillo v. Immigration and Naturalization Service, No. 90-4161 (5th Cir. April 4, 1991).

The parties to these proceedings in the United States Court of Appeals for the Fifth Circuit were Ana Lucia Hodge, Rodolfo Escobedo Gonzalez, and Harold J. Amador-Castillo, petitioners herein, and the United States Department of Justice and the Immigration and Naturalization Service, respondents herein.

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The petitioners, Ana Lucia Hodge, Rodolfo Escobedo Gonzalez, and Harold J. Amador-Castillo, respectfully pray that a writ of certiorari issue to review the judgments and the opinions of the United States Court of Appeals for the Fifth Circuit identified immediately below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in *Ana Lucia Hodge v. United States Department of Justice* is reported at 929 F.2d 153 (5th Cir. 1991) and is reproduced as Appendix A-1 of Petitioners' Appendix submitted together with this Petition. The underlying Decision of the Board of Immigration Appeals is unreported and reproduced as Appendix A-2. The unreported Decision and Order of the Immigration Judge is reproduced as Appendix A-3.

The opinion of the United States Court of Appeals for the Fifth Circuit in *Rodolfo Escobedo Gonzalez v. Immigration and Naturalization Service*, No. 90-4440 (5th Cir. April 22, 1991) is unreported and reproduced as Appendix B-1. The underlying Decision of the Board of Immigration Appeals is unreported and reproduced as Appendix B-2. The unreported Order of the Immigration Judge is reproduced as Appendix B-3.

The opinion of the United States Court of Appeals for the Fifth Circuit in *Harold J. Amador-Castillo v. Immigration and Naturalization Service*, No. 90-4161 (5th Cir. April 4, 1991) is unreported and reproduced as Appendix C-1. The underlying Decision of the Board of Immigration Appeals is unreported and reproduced as Appendix C-2. The unreported Order of the Immigration Judge is reproduced as Appendix C-3.

Only those opinions of the Fifth Circuit, decisions of the Board of Immigration Appeals, and orders of the immigration judges related to the petitioners' applications for attorney's fees under the Equal Access to Justice Act are identified above and reproduced in Petitioner's Appendix. The petitioners' entitlement to those attorney's fees is the only issue presented for review by this Petition.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit

entered judgment in *Hodge* and *Amador-Castillo* on April 4, 1991, and in *Escobedo Gonzalez* on April 22, 1991. This petition for writ of certiorari regarding all three cases is filed within ninety days of the date of the first of those judgments. This Court's jurisdiction to review those judgments is invoked under and conferred by 28 U.S.C. § 1254(1) and Sup. Ct. R. 17.

STATUTORY PROVISIONS INVOLVED

The four statutory provisions set out below are involved in this case.

The Equal Access to Justice Act's provision for payment of attorney's fees and costs in adversary administrative adjudications, 5 U.S.C. § 504(a)(1):

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

The Equal Access to Justice Act's definition of "adversary adjudication," 5 U.S.C. § 504(b)(1)(C):

> [A]dversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, (ii) any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of that Act (41 U.S.C. 607), and (iii) any hearing conducted under chapter 38 of title 31; . . . .

The Administrative Procedure Act's definition of covered agency adjudications, 5 U.S.C. § 554(a):

> This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—
>
> (1) a matter subject to a subsequent trial of the law and the facts de novo in a court;
>
> (2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;
>
> (3) proceedings in which decisions rest solely on inspections, tests, or elections;
>
> (4) the conduct of military or foreign affairs functions;
>
> (5) cases in which an agency is acting as an agent for a court; or
>
> (6) the certification of worker representatives.

The Immigration and Nationality Act's provision governing deportation proceedings, § 242(b) of that Act, 8 U.S.C. § 1252(b):

> A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper

safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. In any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General shall be final. In the discretion of the Attorney General, and under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 241 if such alien voluntarily departs from the United States at his own expense, or is removed at Government expense as hereinafter authorized, unless the Attorney General has reason to believe that such alien is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), (18), or (19) of section 241(a). If any alien who is authorized to depart voluntarily under the preceding sentence is financially unable to depart at his own expense and the Attorney General deems his removal to be in the best interest of the United States, the expense of such removal may be paid from the appropriation for the enforcement of this Act.

STATEMENT OF THE CASE

The facts hereinafter set forth are those alleged below by Ana Lucia Hodge, Rodolfo Escobedo Gonzalez, and Harold J. Amador-Castillo. Because in each case the immigration judge dismissed the application for attorney's fees under the Equal Access to Justice Act (hereinafter EAJA) on jurisdictional grounds without reaching the merits of the claim, the factual allegations relevant only to the attorney's fees issues have yet to be ruled upon by any tribunal.

1. *Ana Lucia Hodge v. United States Department of Justice*

Ana Lucia Hodge is an immigrant from Colombia who was accorded the status of having been lawfully admitted for permanent residence on a conditional basis by virtue of her

marriage to a citizen of the United States. Subsequent to obtaining that status, Mrs. Hodge left her husband because he beat her up. Without any sort of prior notice or opportunity to be heard, on August 3, 1988 the Immigration and Naturalization Service (hereinafter INS) terminated Mrs. Hodge's lawful status and instituted deportation proceedings against her based on the allegation that she had engaged in a fraudulent marriage to obtain her immigration status.

At the time it terminated her status, the INS told Mrs. Hodge that it had a sworn statement by her husband relevant to the validity or viability of their marriage. The INS never produced such a statement to Mrs. Hodge or to the immigration court, but nonetheless used that alleged statement as a basis for prosecuting the deportation proceedings against Mrs. Hodge. On February 22, 1989, the immigration judge terminated the deportation proceedings against Mrs. Hodge because of the INS's failure to provide her an opportunity to confront and respond to the allegations and evidence against her prior to terminating her status. On October 12, 1989, the INS accorded Mrs. Hodge the immigration status of having been lawfully admitted for permanent residence without conditions.

On March 23, 1989, Mrs. Hodge applied to the immigration court for an award of attorney's fees and expenses under the Equal Access to Justice Act, on the ground that the INS's termination of her status and institution of deportation proceedings against her without prior notice and opportunity to be heard was not substantially justified as contemplated by the fee-shifting statute. The immigration judge denied that application for want of jurisdiction by order dated May 10, 1989 (reproduced as Appendix A-3 hereto), and that denial was affirmed by the Board of Immigration Appeals (hereinafter BIA) in its decision of February 1, 1990 (reproduced as Appendix A-2 hereto). The United States Court of Appeals for the Fifth Circuit denied Mrs. Hodge's petition for review of the BIA's order. *Hodge v. United States Department of Justice*, 929 F.2d 153 (5th Cir. 1991) (reproduced as Appendix A-1 hereto).

2. *Rodolfo Escobedo Gonzalez v. Immigration and Naturalization Service*

Rodolfo Escobedo Gonzalez entered the United States as a lawful permanent resident in 1973. In 1981 the INS instituted deportation proceedings against him on the ground that at the time he first entered the United States from Mexico he failed to disclose that he was married. Mr. Escobedo applied for relief from deportation under 8 U.S.C. § 1251(f), which provides for such relief for persons who are the spouses, parents or children of United States citizens or lawful permanent residents and who were otherwise admissible at the time of their original entry.

Mr. Escobedo's application for relief from deportation was considered at a contested hearing before the immigration court in Houston, Texas on July 8, 1988. At that hearing the INS opposed Mr. Escobedo's application with a series of factual allegations lacking evidentiary support and legal propositions lacking authority. After receiving the evidence and arguments presented by counsel for the parties, the immigration judge found that every factor in the case weighed in Mr. Escobedo's favor, determined the evidence to be overwhelming on his side, announced that she could not "imagine a stronger case for the positive exercise of discretion than the one at bar," and granted Mr. Escobedo's application.

The INS appealed that decision to the BIA, where it supplemented the arguments it made before the immigration court with an additional series of unfounded and unexplained reasons that the decision in Mr. Escobedo's favor should be reversed, exemplified by the INS's assertion that the fact that Mr. Escobedo's insurance agent testified on his behalf rendered Mr. Escobedo's own credibility suspect. The INS submitted its appeal brief to the BIA (forcing Mr. Escobedo to do likewise) even after having been informed that the deportation case had been effectively mooted by virtue of Mr. Escobedo's legalization under the Immigration Reform and Control Act of 1986. Only after all briefing to the BIA had been completed did the INS withdraw its

appeal of the immigration judge's decision.

Mr. Escobedo then applied to the immigration court for an award of attorney's fees and expenses under the EAJA, on the ground that the INS's opposition to his application for relief from deportation, and in particular its aborted prosecution of an unfounded and useless appeal to the BIA, were not substantially justified. The immigration court dismissed Mr. Escobedo's application for attorney's fees and expenses for want of jurisdiction by order dated April 17, 1990 (reproduced as Appendix B-3 hereto), and the BIA affirmed that dismissal in its decision dated May 2[illegible], 1990 (reproduced as Appendix B-2 hereto). Mr. Escobedo's petition for review of the BIA's decision was denied by the United States Court of Appeals for the Fifth Circuit in its decision of April 22, 1991 (reproduced as Appendix B-1 hereto).

3. *Harold J. Amador-Castillo v. Immigration and Naturalization Service*

Harold J. Amador-Castillo came to the United States with his mother and sisters from his native country of Nicaragua at the age of eleven in February, 1980. Seven and one-half years later the INS instituted deportation proceedings against Mr. Amador, charging that he was deportable for having entered the United States without inspection, and also for having been convicted of two crimes involving moral turpitude. Mr. Amador conceded his deportability and applied for political asylum on the ground that he had a well founded fear of persecution were he to be returned to Nicaragua.

The basis of Mr. Amador's asylum application was that his father had been in charge of General Anastasio Somoza's boats during the Somoza government, and that for that reason his family members were suffering persecution at the hands of the Sandinista regime. Although the United States Department of State informed the INS prior to a hearing on Mr. Amador's asylum application that he did indeed have a well founded of persecution in

Nicaragua, the INS rejected that evaluation of Mr. Amador's asylum claim, and also rejected, without offering legal authority, his contention that the crimes for which he had been convicted did not constitute a basis for denying the relief from deportation he requested. On September 20, 1988 the immigration court granted Mr. Amador's asylum application.

Mr. Amador then applied for attorney's fees and expenses under the EAJA, arguing that the INS's opposition to his asylum application following the State Department's advisory letter was not substantially justified. The immigration court denied the application for attorney's fees and expenses for want of jurisdiction by order dated September 8, 1989 (reproduced as Appendix C-3 hereto), which denial was affirmed by the BIA in its decision of February 1, 1990 (reproduced as Appendix C-2 hereto). Mr. Amador's petition for review of the BIA's decision was denied by the United States Court of Appeals for the Fifth Circuit in its decision of April 4, 1991 (reproduced as Appendix C-1 hereto).

4. Basis for Decisions Below

The three decisions in each of the three cases share a common legal basis. In each case the immigration judge denied the petitioner's application for attorney's fees, the BIA affirmed that denial, and the Fifth Circuit denied the petition for review, on the ground that attorney's fees under the EAJA are not available in deportation proceedings.

5. Basis for Federal Jurisdiction Below

The basis for federal jurisdiction below in all three cases was 5 U.S.C. § 504(c)(2), the provision of the EAJA that allows a party dissatisfied with a determination of fees and other expenses made by a federal agency to appeal that determination "to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication." The court with jurisdiction to review the underlying decision in

the deportation proceedings brought against the three petitioners herein was the court of appeals for the judicial circuit in which those proceedings were conducted, *see* 8 U.S.C. § 1105a(a)(1) & (2), which, as all three deportation proceedings were conducted in Texas, was the United States Court of Appeals for the Fifth Circuit.

ARGUMENT

A. The Opinion of the Fifth Circuit in the Case at Bar is in Direct and Irreconcilable Conflict with the Opinion of the Ninth Circuit in *Escobar Ruiz v. INS*, 838 F.2d 1020 (9th Cir. 1988) (*en banc*).

The coverage provision of the EAJA states that the Act applies to any "adversary adjudication," which it defines as "an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise . . . ." 5 U.S.C. § 504(b)(1)(C). The legal issue presented in this case can be reduced to whether the word "under" in the quoted language means "as defined by," or alternatively "governed by" or "subject to." If "under" means "as defined by," then deportation proceedings are covered by the EAJA, because in deportation proceedings the government is represented by counsel, and such proceedings are clearly "adjudication[s]" *as defined by* "section 554 of this title" (the Administrative Procedure Act's definitional and coverage provision). If, on the other hand, "under" means "governed by" or "subject to" the Administrative Procedure Act (hereinafter APA), then the holding in *Marcello v. Bonds*, 349 U.S. 302 (1955), that the Immigration and Nationality Act supersedes the APA where the two diverge in relation to deportation proceedings, stands as a significant obstacle to the petitioners' position.

The first federal appellate court to rule on this issue was the United State Court of Appeals for the Ninth Circuit. In *Escobar Ruiz v. Immigration and Naturalization Service*, 838 F.2d 1020 (9th Cir. 1988) (*en banc*), that court addressed and analyzed the applicability of the EAJA to deportation proceedings. The

government contended that "under" in 5 U.S.C. § 504(b)(1)(C) means "governed by" or "subject to," and when combined with *Marcello v. Bonds*, 349 U.S. 302 (1955), operates to remove deportation proceedings from the scope of the EAJA. The petitioner argued that the EAJA applies to deportation proceedings because "under" means "as defined by," and deportation proceedings are adversary and meet 5 U.S.C. § 554(a)'s definition of "adjudication." The Ninth Circuit thought both proferred readings of "under" plausible on their face, *Escobar Ruiz*, 838 F.2d at 1023, but found its inquiry answered by the 1980 legislative history of the EAJA, the purpose of the original statute as expressed by Congress, and the legislative history of the EAJA's re-enactment in 1985.

First, the court looked to the Joint Explanatory Statement on the EAJA issued by the Conference Committee at the time that it delivered the bill to the President for his signature, and there found persuasive support for Mr. Escobar Ruiz's position in the Committee's announcement that § 504(b)(1)(C) "defines adversary adjudication as an agency adjudication *defined under* the Administrative Procedure Act where the agency takes a position through representation by counsel or otherwise." H. R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 23, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5003, 5012. *See Escobar Ruiz*, 838 F.2d at 1023 (emphasis supplied by Ninth Circuit).

Next, the court looked for the purpose of the EAJA as stated by Congress, and found that the premise of the statute, as reflected in the original House Report on the bill, H. R. Rep. No. 1418, 96th Cong., 2d Sess. 10, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4984, 4988-89, was that a party litigating an issue against the government helps refine and formulate public policy by subjecting government action to the test of the adversary system, and thereby helps insure the legitimacy and fairness of the law. *Escobar Ruiz*, 838 F.2d at 1025. The purpose of the EAJA, therefore, was to promote this salutary function of the adversary process and "to increase the accessibility to justice" by ensuring that private litigants "will not be deterred from seeking review of,

or defending against, unjustified governmental action because of the expense involved in securing the vindication of their rights." *Id.* at 1025-26, *quoting* H.R. Rep. No. 120, 99th Cong. 1st Sess. pt. 1 4, 8 (1985), *reprinted in* 1985 U.S. Code Cong. & Ad. News 132, 132-33, 136.

With the statute's purpose revealed, the Ninth Circuit found the original House Report's explanation of why attorney's fees would be awarded only in those adversary federal administrative agency proceedings constituting "adjudications" under 5 U.S.C. § 554 to be relevant to the court's inquiry. The House had explained that it was in situations where parties "have a concrete interest at stake" but nevertheless may be deterred from asserting or defending that interest because of the time and expense involved in pursuing administrative remedies that individuals' attempts to protect their rights against the government will be most costly, and also most likely to define and promote public policy by subjecting the government's position to the scrutiny of the adversary system. *Escobar Ruiz*, 838 F.2d at 1026, *citing* H.R. Rep. No. 1418, *supra*, at 14, *reprinted in* 1980 U.S. Cong. & Ad. News 4984, 4993.

That focus, explained the Ninth Circuit, indicated that the reference to 5 U.S.C. § 554 in § 504(b)(1)(C) was not designed to limit the coverage of the EAJA to adjudications technically governed by the APA, but rather was intended to identify the type of agency proceedings that were most likely to produce both the injustices EAJA sought to remedy (private parties being forced to endure improper government action rather than to contest it because of the expense of representation), and the additional benefits it sought to bring (the testing of public policy by the adversary process). The court found that it would be inconsistent with both of these purposes, and therefore with the policies and purposes of the EAJA, to limit that statute's coverage to adversary adjudications technically governed by 5 U.S.C. § 554 and exclude other adjudications meeting § 554(a)'s definition that were equally adversary and equally burdensome. *Escobar Ruiz*, 838 F.2d at 1026.

The Ninth Circuit in *Escobar Ruiz* finally found support for

the "as defined by" construction of "under" in the treatment Congress gave Social Security administrative hearings. While Congress considered most such proceedings to fall outside the scope of the EAJA because they are not "adversary," it expressly indicated that it believed Social Security administrative hearings in which the government is represented by counsel to be included within the EAJA's coverage. *Escobar Ruiz*, 838 F.2d at 1027, *discussing* H.R. Rep. No. 120, 99th Cong., 1st Sess. pt.1 10, *reprinted in* 1985 U.S. Code Cong. & Ad. News, 132, 138-39. The significance of that partial inclusion of Social Security administrative hearings to the issue under consideration, according to the Ninth Circuit, was that at the time whether such hearings were "governed by" the APA was very much an open question. *Escobar Ruiz*, 838 F.2d at 1026. By finding them to constitute "adversary adjudications" within the meaning of 5 U.S.C. § 504(b)(1)(C) in spite of that uncertainty, reasoned the court, Congress indicated that it was looking to the nature of an administrative proceeding, not to the identity of its governing statute, to determine whether the EAJA applied. *Escobar Ruiz*, 838 F.2d at 1027.[1]

For these reasons, the Ninth Circuit ruled that "under" means "as defined by," and that the words "an adjudication under section 554" contained in 5 U.S.C. § 504(b)(1)(C) therefore mean "an adjudication determined, by statute, on the record and after an opportunity for an agency hearing." As deportation proceedings met that definition, the court found them to be covered by the administrative fee-shifting provisions of the EAJA, and rejected the government's arguments to the contrary as resting on a "hypertechnical interpretation of the EAJA" unsupported in the statute or its legislative history. *Escobar Ruiz*, 838 F.2d at 1027, 1030.

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1. The *Escobar Ruiz* court found the government's position that deportation proceedings cannot be covered by the EAJA because they are not governed by the APA to be inconsistent with its ackowledgment that Social Security proceedings can be covered by the EAJA even though they may not be conducted under the authority of the APA. *Escobar Ruiz*, 838 F. 2d at 1027 & n. 10.

In reaching its decision, the Ninth Circuit also took the opportunity to examine *Marcello v. Bonds*, 349 U.S. 302 (1955), which was the primary authority offered as support for the government's position. The court determined that *Marcello* did not remove deportation proceedings from the APA altogether, but held only that 8 U.S.C. § 1252(b) "supersedes" the APA's hearing provisions where the two statutes diverge. *Escobar Ruiz*, 838 F.2d at 1025. That distinction deserved special attention, according to the court, in evaluating the impact of *Marcello* on the question of whether the EAJA applies to deportation proceedings. That was because the underlying divergence that caused the *Marcello* Court to determine that 8 U.S.C. § 1252(b) supersedes the APA's hearing provisions--the Immigration and Nationality Act allowed for a single officer to act as judge and prosecutor in deportation proceedings, which was sharply different from the APA's requirement that the prosecutorial and judicial functions be wholly separate--had been eradicated, *Escobar Ruiz*, 838 F.2d at 1025, leaving "[t]he hearing provisions of the INA and the APA [] now fundamentally identical." *Id.* at 1025. The Ninth Circuit's suggestion was that the disappearance of the divergence between the two classes of procedures leaves nothing in the APA for 8 U.S.C. § 1252(b) to supersede, and that therefore *Marcello*, while not overruled, has lost its relevance. *Id.*

In the case at bar, the Fifth Circuit addressed precisely the same statutory provisions, analyzed essentially the same authorities, and reached exactly the opposite conclusion.[2] *Hodge*

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2. The *Escobar Ruiz* court also reached and decided the disputed issue of whether 8 U.S.C. § 1362, the Immigration and Nationality Act's right-to-counsel provision, precludes application of the EAJA to deportation proceedings by according persons in deportation proceedings the "privilege of being represented (at no expense to the Government)." The Ninth Circuit found that provision not to constitute a bar to fee shifting under the EAJA. *Escobar Ruiz*, 838 F.2d 1028-29. Although the parties to the instant case raised and argued this issue below, the Fifth Circuit did not reach it.

v. United States Department of Justice, 929 F.2d 153 (5th Cir. 1991).[3] The decision of the Fifth Circuit[4] is therefore in direct and irreconcilable conflict with the decision of the Ninth Circuit in *Escobar Ruiz*, and only review by this Court can resolve that conflict.

B. This Case Presents an Important Issue of Federal Law which has not been, but should be, Settled by this Court.

It is seductively easy to characterize the issue presented in this case in a manner that belittles its importance. While this Court's construction of "under" might well resolve the dispute, the petitioners do not come to this Court solely for the purpose of learning what "under" means. Judicial determinations of the EAJA's coverage, and in particular such determinations made by this Court, do not merely define the law in order to allow people to conform their conduct to same. Nor do they simply redistribute resources among litigants, or decide which of two or more competing parties will receive or pay for a particular public or private good. Rather, they determine whether persons forced into legal battle with their own government will have access to the resources necessary to defend themselves.

It is therefore wrong to view the issue in dispute in this case simply as whether a party who prevails against the government in deportation proceedings can recover his or her attorney's fees, because to do that suggests and assumes that the EAJA coverage issue arises and takes on importance only after the deportation

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3. *Hodge* is the Fifth Circuit's pronouncement on the issue. The other two decisions for which review is sought by this Petition were brief, unpublished, per curiam opinions adopting *Hodge* as controlling authority. *See* Appendix B-1 and Appendix C-1 hereto.

4. Two other courts of appeals have reached the same result on this issue. *See Clarke v. Immigration and Naturalization Service*, 904 F.2d 172 (3rd Cir. 1990), *Ardestani v. United States Department of Justice, Immigration and Naturalization Service*, 904 F.2d 1505 (11th Cir. 1990), *cert granted*, March 4, 1991.

proceedings conclude in the private party's favor. That assumption erroneously reduces both the class of persons affected by the issue presented by this case and the significance of the issue itself to such persons.

The persons affected by the availability of attorneys' fees under the EAJA in deportation proceedings include not only those who hire counsel and prevail in those proceedings, but more importantly those who upon the initiation of such proceedings find themselves, or will find themselves if the Fifth Circuit's decision is allowed to stand, unable to mount a defense against the government due to lack of resources. The ability of a person who successfully defended himself against unjustified government action in deportation proceedings to recover his attorney's fees and expenses under the EAJA is certainly important to that person. However, the *possibility* of recovering such fees and expenses is tremendously more important to the other person who would otherwise be unable to obtain representation in deportation proceedings, because it represents his only chance to defend himself. Denied that chance, he goes quietly, and the questions of whether the government's actions in achieving his deportation were lawful, proper, and justified are never asked and never answered.

The purpose of the EAJA is therefore not just to allow litigants to recover from the government the attorney's fees the government unreasonably causes them to incur, although that is how the statute operates and achieves its purpose. Congress stated the purpose of the EAJA with unmistakable clarity in both the statute's title—Equal *Access to Justice* Act—and in its legislative history:

> The bill rests on the premise that certain individuals, partnerships . . . and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights. The

> economic deterrents to contesting governmental action are magnified in these cases by the disparity between the resources and expertise of these individuals and their government. The purpose of the bill is to reduce the deterrents and disparity by entitling certain prevailing parties to recover an award of attorney's fees, expert witness fees and other expenses against the United States . . . .

H.R. Rep. No. 1418, 96th Cong., 2d Sess. 5-6, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4984[5]. Given that clear declaration of statutory purpose, courts called upon to interpret the EAJA should "endeavor to interpret the fee statute . . . in light of its purpose to diminish the deterrent effect of seeking review of, or defending against, governmental action . . . ." *Sullivan v. Hudson*, 490 U.S. 877, 889-90 (1989) (interior quotations omitted).

In no other area of the law do the purpose and effects of EAJA coverage have greater importance than they have in deportation proceedings. First, the interests at stake for the private litigant involved in those proceedings are enormous. The Supreme Court recognized long ago that deportation, which is the sanction imposed on an unsuccessful private litigant, can deprive a person of "all that makes life worth living." *See Ng Fong Ho v. White*, 259 U.S. 276, 284 (1922). *See also Bridges v. Wixon*, 326 U.S. 135, 154 (1945) ("[D]eportation . . . visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty--at times a most serious one--cannot be doubted.")

Second, the parties to deportation proceedings are perforce mismatched. On one side is the United States, acting through and represented by its Department of Justice, which can be fairly characterized as the world's largest law firm and the possessor of unrivaled expertise regarding the immigration and nationality laws it interprets, administers and enforces. On the other side is an immigrant, often poor and relatively or absolutely uneducated, and

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5. That same language appears in the "Findings and Purpose" provision of EAJA as originally enacted. *See* Equal Access to Justice Act, Pub. L. No. 96-481, § 202, 94 Stat. 2325 (1980).

likely to be unfamiliar with our language and the workings of our legal system. *See Escobar Ruiz v. Immigration and Naturalization Service*, 813 F.2d 283, 292 (9th Cir. 1987), *aff'd*, 838 F.2d 1020 (9th Cir. 1988) (*en banc*).

Third, the mismatched parties engage one another over the tremendous (to the private party) interests at stake on a field of battle defined and occupied by the maze of the immigration and nationality laws and their administrative and judicial interpretations. The complexity of those laws and procedures is the stuff of legend. As one federal judge has written:

> We have had occasion to note the striking resemblance between some of the laws we are called upon to interpret and King Minos's labyrinth in ancient Crete. The Tax Laws and the Immigration and Nationality Acts are examples we have cited of Congress's ingenuity in passing statutes certain to accelerate the aging process of judges. In this instance, Congress, pursuant to its virtually unfettered power to exclude or deport natives of other countries, and apparently confident of the aphorism that human skill, properly applied, can resolve any enigma that human inventiveness can create, has enacted a baffling skein of provisions for the I.N.S. and courts to disentangle.

Lok v. Immigration and Naturalization Service, 548 F.2d 37, 38 (2nd Cir. 1977) (Kaufman, Chief Judge). *See also Castro-O'Ryan v. Department of Immigration & Naturalization*, 821 F.2d 1415, 1419 (9th Cir. 1987) ("With only a small degree of hyperbole, the immigration laws have been termed second only to the Internal Revenue Code in complexity.") (interior quotations omitted).

In light of the tremendous interests at stake in deportation proceedings, the nature of (and relative distribution of resources between) the parties to such proceedings, and the great complexity of the laws involved, it is hard to imagine any other area of administrative litigation in which representation by counsel is more important, *see Castro-O'Ryan*, *supra*, 821 F.2d at 1419, or in which Congress's purposes in enacting EAJA would apply with

greater force. If the EAJA, as the Fifth Circuit in *Hodge* found, does not cover deportation proceedings, then a party without his own funds to hire counsel has no realistic opportunity to respond to unjustified governmental action in those proceedings and no effective means to secure vindication of his rights, and is therefore forced to endure a governmentally inflicted injustice because he is unable to contest it, which is precisely the wrong EAJA was passed to right. *See* H.R. Rep. No. 1418, 96th Cong., 2d Sess. 9-10, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4984, 4988.

To allow the Fifth Circuit's decision in *Hodge* to stand and become the law of the land would frustrate the EAJA's purpose with regard to the very persons it would seem to best serve. Whether that is to happen is an important issue of federal law that should be decided by this Court.

C. The Question Presented for Review in this Case is Currently Pending before this Court on a Previous Grant of a Writ of Certiorari.

On March 4, 1991, this Court granted a petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit in *Ardestani v. United States Department of Justice, Immigration and Naturalization Service*, 904 F.2d 1505 (11th Cir. 1990). The *Ardestani* case presents for review the same question presented by this case. *Ardestani* will apparently be scheduled for oral argument in the next Term of this Court and decided some time thereafter.

Based on the pendency of *Ardestani* in this Court, the petitioners respectfully suggest that the best option for future proceedings in this case is that this Petition be granted, and this case be combined with *Ardestani* for oral argument and/or decision. That would allow this Court to consider the additional arguments presented in this case in resolving the common issue shared by this case and *Ardestani*.

CONCLUSION

For the reasons stated above, petitioners respectfully request that their Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be granted, that the Fifth Circuit's decisions be reversed, and that these cases be remanded to that court for further proceedings.

Respectfully submitted,

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